NO. 11-10182

BEFORE THE HONORABLE SUSAN P. GRABER,
MARSHA S. BERZON AND RICHARD C. TALLMAN, CJJ
OPINION FILED MARCH 8, 2013

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MARCEL DARON KING,

Defendant-Appellant.

On Appeal From the United States District Court
for the Northern District of California
Case No. 10-cr-0455-WHA-1
Honorable William H. Alsup, District Court Judge

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF DEFENDANT-APPELLANT'S PETITION FOR REHEARING EN BANC AND REVERSAL OF THE DISTRICT COURT'S JUDGMENT

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STATEMENT OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit professional bar association that represents the nation's criminal defense attorneys. Its mission is to promote the proper and fair administration of criminal justice, and to ensure justice and due process for those accused of crime or misconduct. NACDL has an interest in this case because its members represent criminal defendants within the Ninth Circuit who will be adversely affected by the panel's interpretation of how a probationer "consents" to a suspicionless search solely because of its presence as a probation condition, and how that impacts a probationer's reasonable expectation of privacy in his home. NACDL has filed *amicus curiae* briefs in other cases involving the Fourth Amendment. *See United States v. Jones*, 132 S. Ct. 945 (2012); *Kyllo v. United States*, 533 U.S. 27 (2001); *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001); *United States v. Cotterman*, 709 F.3d 952 (9th Cir. 2013) (en banc). This brief is being filed pursuant to Rule 29(a), Federal Rules of Appellate Procedure, all parties having consented.[1]

[1] No one, except for undersigned counsel, has authored the brief in whole or in part, or contributed money towards the preparation of this brief.

INTRODUCTION

Probation and parole are not the same. Probation is "simply one point ... on a continuum of possible punishments" available in the criminal justice system. *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987); *see also United States v. Knights*, 534 U.S. 112, 119 (2001). And that "continuum" means that probationers have a greater expectation of privacy than a parolee. *Samson v. California*, 547 U.S. 843, 850 (2006). Yet despite this difference in privacy expectations, the panel opinion approved of the suspicionless search of probationer King's home on the basis that he "accepted a suspicionless-search condition as part of a probation agreement." *United States v. King*, 711 F.3d 986, 988 (9th Cir. 2013). The panel's conclusion rests on a crucial yet incorrect assumption, specifically that a probationer "accepts" the conditions of probation in a way that results in the complete surrender of his Fourth Amendment rights. Because under the panel's understanding of probation, all probationers are potentially subject to suspicionless searches – a surrender of Fourth Amendment rights reserved only for parolees – its decision must be reheard by the court *en banc*.

ARGUMENT

The Fourth Amendment to the United States Constitution protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. A "Fourth

Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." *Kyllo v. United States*, 533 U.S. 27, 33 (2001) (citing *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)). Searches conducted without a warrant "are presumptively unreasonable." *United States v. Jacobsen*, 466 U.S. 109, 114 (1984).

The Supreme Court has ruled that warrantless searches of probationers and parolees are justified under the Fourth Amendment. *See Knights*, 534 U.S. at 121 (probationers); *Samson*, 547 U.S. at 856 (parolees). Examining the "totality of the circumstances" and balancing the intrusion on an individual's privacy with the government's legitimate interests in supervising probationers and parolees to avoid recidivism and promote reintegration into society, the Court found these warrantless searches reasonable under the Fourth Amendment. *Samson*, 547 U.S. at 848; *Knights*, 534 U.S. at 119. Looking at the privacy interests, the Court found probationers and parolees had reduced expectations of privacy compared to the general public. *Knights*, 534 U.S. at 119; *Samson*, 547 U.S. at 850. This was further amplified for both defendants in those cases specifically because each had an express condition of their post-conviction supervision to some form of warrantless search, which was a "salient" but not dispositive factor. *Knights*, 534 U.S. at 118, *Samson*, 547 U.S. at 852. Ultimately in *Knights*, the Court ruled the Fourth Amendment required "no more than reasonable suspicion to conduct a

search of this probationer's house." *Knights*, 534 U.S. at 121. And in *Samson* the Court went further, approving of suspicionless searches for parolees, since they were entitled to less Fourth Amendment protection than a probationer. *Samson*, 547 U.S. at 857.

But by approving of the suspicionless search here, the panel in essence equated probationers and parolees. Under the panel's logic, all probationers "accept" search conditions by virtue of the condition being imposed, even over the defendant's objection. As a result, anytime the condition is imposed – regardless of whether the probationer "accepted" the condition or not – a probationer surrenders all of his Fourth Amendment rights, just like a parolee. Because the Supreme Court has made clear that probationers have greater Fourth Amendment rights than parolees, this cannot be the law. As a result, the panel opinion cannot stand; rehearing *en banc* should be granted.

A. The Panel's Exclusive Focus on "Consent" and Its Assumptions About the Imposition of Probation Conditions Are Wrong.

The panel operated under an implicit assumption that probationers "accepted" any and all probation conditions as a child accepts a gift, happy to avoid a prison sentence. That may be true in some cases, but not all. Equating the mere *presence* of a search condition as *acceptance* of that condition goes too far.

Both *Knights* and *Samson* made clear that they were not deciding whether each defendant consented to the search condition in a way that resulted in "a

complete waiver of his Fourth Amendment rights in the sense of *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973)." *Knights*, 534 U.S. at 118; *Samson*, 547 U.S. at 852 n. 3. *Schneckloth* held that determining whether a defendant "consented" to a search under the Fourth Amendment requires a court to find the consent was "voluntary" rather than "the product of duress or coercion, express or implied" because even subtle coercion would make the resulting context "no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed." *Schneckloth*, 412 U.S. at 227, 228. Although "knowledge of the right to refuse consent" was a factor for the court to consider, it was not dispositive of the issue. *Id.* at 227. The Court in *Knights* and *Samson* did not have to decide whether there was voluntary consent because it found the searches independently "reasonable" in each case without looking deeply at the circumstances surrounding the imposition of the search condition. *Knights*, 534 U.S. at 112; *Samson*, 547 U.S. at 852 n. 3.

But the panel here noted it was confronted with the question left open in *Knights*: whether the probation condition "so diminished, or completely eliminated" a probationer's reasonable expectation of privacy such that "a search by a law enforcement officer without any individualized suspicion would have satisfied the reasonableness requirement of the Fourth Amendment." *King*, 711 F.3d at 989 (quoting *Knights*, 534 U.S. at 120 n. 6) (quotations omitted)). It

concluded "that a suspicionless search, conducted pursuant to a suspicionless-search condition of a probationer's probation agreement, does not violate the Fourth Amendment." *Id.* at 991. It specifically reserved for another day whether "the Fourth Amendment permits suspicionless searches of probationers who have *not* accepted a suspicionless-search condition, because that case is not before us." *Id.* (emphasis in original). In essence, the panel found the search "reasonable" for no reason other than the fact King supposedly "consented" to it. This is a fundamental misunderstanding of Fourth Amendment jurisprudence and the realities of probation.

1. Consent is Merely a Factor to Consider When Deciding Whether a Search is "Reasonable."

The panel's zero-sum approach to "consent" is contrary to the law surrounding the reasonableness of a search under the Fourth Amendment. "Consent" is "merely a relevant factor in determining how strong [an] expectation of privacy is . . . and thus may *contribute* to a finding of reasonableness." *United States v. Scott*, 450 F.3d 863, 868 (9th Cir. 2005) (quotations and citations omitted) (emphasis added); *see also Sanchez v. County of San Diego*, 464 F.3d 916, 938 (9th Cir. 2006) (Fisher, J., dissenting). But it is not the sole deciding factor. Other Circuits have agreed that consent to a search may "diminish" – not extinguish – an expectation of privacy. *Norris v. Premier Integrity Solutions, Inc.*, 641 F.3d 695, 699 (6th Cir. 2011); *Wilcher v. City of Wilmington*, 139 F.3d 366, 374 (3d Cir.

1998). But as *Scott* made clear, "consent to any search is only valid if the search in question (taking the fact of consent into account) was reasonable." *Scott*, 450 F.3d at 868; *see also Sanchez*, 464 F.3d at 924 (analyzing whether warrantless searches of welfare recipient's home "reasonable" under the Fourth Amendment although recipients had "consented" to searches); *see also State v. Fields*, 67 Haw. 268, 282, 686 P.2d 1379 (1984) ("a warrantless search must meet a test of reasonableness even when carried out in fulfillment of a condition of probation.")

So whether King or any probationer consents to a search condition as a term of probation is a relevant consideration, but is not dispositive of the issue; the court must still look at the reasonableness of the search including an examination of the circumstances surrounding the purported "consent" to ensure it was "voluntary." *Schneckloth*, 412 U.S. at 227.

2. Probationers Do Not Necessarily "Accept" Probation Terms.

The second fatal mistake the panel made was to assume that all probationers "consent" or "accept" search conditions imposed upon them as part of probation. This shows nothing more than a fundamental misunderstanding of how probation is imposed.

In California, a sentencing court has "broad discretion" to determine whether to impose probation and on what terms. *People v. Welch*, 5 Cal. 4th 228, 233, 851 P.2d 802 (1993). This discretion allows the sentencing court to "impose

and require" any conditions it determines are "fitting and proper to the end that justice may be done." Cal. Penal Code § 1203.1(j). Unlike a parolee, a probationer is not subject to an automatic search condition; instead it is something the sentencing court can impose in its discretion. *See Welch*, 5 Cal. 4th at 233 ("[m]ost conditions. . . stem from the sentencing court's general authority to impose any 'reasonable' condition"); *see also King*, 711 F.3d at 992 n. 1 (Berzon, J., dissenting); Cal. Penal Code § 3067(b)(3) (parolee "subject to search or seizure by a probation or parole officer or other peace officer at any time of the day or night, with or without a search warrant or with or without cause").

But the way probation conditions are imposed shows that not all conditions are "accepted" by the probationer. In California, after a person is convicted the court must refer the case to a probation officer who investigates the crime and the defendant, and provides a written report to the court, including "recommendations as to the granting or denying of probation and the conditions of probation, if granted." Cal. Penal Code §§ 1203(b)(1), (2)(A). Defendants can appeal from the order granting probation. Cal. Penal Code § 1237(a); *see People v. Oppenheimer*, 236 Cal. App. 2d 863, 864 (1965) (defendant objected to grant of probation on appeal). And they can object to any of the probation conditions imposed upon them, provided they do so before the sentencing court. *Welch*, 5 Cal. 4th at 235. If their objection is overruled, they can appeal the probation condition. *See, e.g.*,

People v. O'Neil, 165 Cal. App. 4th 1351, 1354 (2008) (condition forbidding probationer from associating with "any person, as designated by your probation officer" overbroad); *People v. Garcia*, 19 Cal. App. 4th 97, 100 (1993) (condition forbidding probationer from associating with "felons, ex-felons or users or sellers of narcotics" unconstitutionally overbroad); *People v. Hackler*, 13 Cal. App. 4th 1049, 1060 (1993) (condition requiring probationer to wear t-shirt with bold, printed statement of his status as a felony theft probationer unreasonable). Of course, the appeals court may find the condition proper over the probationer's objection, and the probationer is simply stuck with the condition, whether he likes it or not.

This practice is not exclusive to California; all the states within the Ninth Circuit have adopted similar procedures. *See* Ariz. Rev. Stat. Ann. § 13-914(a)(2); Ariz. R. Crim. P. 26.4(a), 26.8(a); Alaska Stat. Ann. § 12.55.025; Alaska R. Crim. P. 32.1; Haw. Rev. Stat. §§ 706-601, 706-604; Idaho Code Ann. § 20-220; Idaho Crim. R. 32; Mont. Code Ann. §§ 46-18-111 – 46-18-113; Nev. Rev. Stat. Ann. § 176A.200; Or. Rev. Stat. Ann. §§ 137.079, 137.530(1); 138.053(1)(d); Wash. Rev. Code Ann. § 9.94A.500(1).[2]

[2] Critically, not a single state within the Ninth Circuit *requires* a completely suspicionless search as a mandatory condition of probation. Most states give sentencing courts discretion to impose a search condition if there is some "nexus" to the crime of conviction. *See* Ariz. Rev. Stat. Ann. § 13-914(e); Alaska Stat. Ann. § 12.55.100(a); Haw. Rev. Stat. § 706-624(1)(f); Idaho Code Ann. § 19-2601(2);

Even in federal court, where there is no parole, a defendant can be subject to probation and supervised release conditions over his own objection. *See e.g.*, *United States v. Watson*, 582 F.3d 974, 983-84 (9th Cir. 2009) (affirming supervised release condition banning travel into San Francisco over defendant's objection); *United States v. Daniels*, 541 F.3d 915, 926 (9th Cir. 2008) (affirming lifetime term of supervised release and conditions requiring Abel and polygraph testing over defendant's objection). Like California, before imposing sentence, federal courts must direct the probation office to prepare a presentence report that contains recommended probation or supervised release conditions. Fed. R. Crim. P. 32(c). The defendant can object to the report and its recommended supervision conditions. Fed. R. Crim. P. 32(f). If the Court imposes probation, it is not required to impose a search condition, but has discretion to impose any condition "reasonably related" to the 18 U.S.C. § 3553(a) sentencing factors. 18 U.S.C. § 3563(b)(22). The same is true for defendants sentenced to a term of supervised release, where the court has discretion to impose "any condition" it deems

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Nev. Rev. Stat. Ann. §§ 176A.400(1)(c), 193.130(2)(e); Wash. Rev. Code Ann. §§ 9.95.210(1)(a), 9.92.060(1). Montana and Oregon permit warrantless searches by statute provided they are supported by reasonable suspicion of criminal activity. *See* Mont. Code Ann. §§ 46-18-201(4)(p), 46-18-202(1)(g); Mont. Admin. R. 20.7.1101(7); Or. Rev. Stat. Ann. § 137.540(1)(i). Hawaii has done the same by case law. *Fields*, 67 Haw. at 282 (probation condition permitting warrantless search of probationer for drugs still requires reasonable suspicion).

appropriate and reasonably related to the 18 U.S.C. § 3553(a) sentencing factors. 18 U.S.C. § 3583(d).[3]

A probationer whose objection to a probation condition is overruled and chooses not to appeal, or who unsuccessfully appeals the condition, does not "accept" the specific condition in the same way a probationer who does not object does. This is true even though the alternative to probation is oftentimes the risk of a prison sentence. Theoretically, a probationer whose objection to a probation condition is overruled could refuse probation and receive a prison sentence instead.[4] But this Court has made clear time and again that probationers do not give up their Fourth Amendment rights simply by agreeing to a search condition as a term of probation. *Scott*, 450 F.3d at 868 (citing *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 261 (9th Cir. 1975) (en banc)); *see also State v. Hayes*, 809 N.W.2d 309, 321 (N.D. 2012) (consent to a search involuntary when defendant

[3] A search condition is mandatory only for defendants convicted of a crime that requires them to register under the Sex Offender Registration and Notification Act. 18 U.S.C. § 3583(d).

[4] Some defendants may prefer not to have probation imposed upon them in the first place because it often results in a longer period of post-release supervision by a probation officer. A defendant charged with driving under the influence of alcohol may prefer a 30-day jail sentence with no supervision to follow instead of a shorter jail sentence followed by a lengthy term of probation involving the close scrutiny and supervision of a probation officer and the threat of a return to prison for violating probation. In federal court, a defendant convicted of a Class C felony – a crime punishable with a maximum sentence of between ten and twenty-five years – can receive up to five years of probation but no more than three years of supervised release. 18 U.S.C. §§ 3559(a)(3), 3561(c)(1), 3583(b)(2).

told she had to either consent to the search or risk violating pre-trial release conditions). As explained earlier, consent is just one factor for the court to consider in assessing the reasonableness of the search. Moreover, any probation condition that is imposed must be constitutional, including permitting only searches that are independently "reasonable" under the Fourth Amendment. *See Scott*, 450 F.3d at 866 (discussing "unconstitutional conditions" doctrine); *see also Knights*, 534 U.S. at 118 n. 4 (government conceded "unconstitutional conditions doctrine [is] a limitation on what a probationer may validly consent to in a probation order").

Thus, the panel's belief that the mere presence of a search condition indicates "acceptance" of a blanket, suspicionless search condition and a waiver of all Fourth Amendment rights is wrong.

B. The Reasonable Suspicion Standard Should Apply to All Searches of a Probationer's Home.

Because the mere presence of any search condition is not dispositive about whether a suspicionless search is permissible – particularly because a defendant may not "accept" the specific search condition – the panel should have done more before stripping King and other probationers of their Fourth Amendment rights. As Judge Berzon noted in her dissenting opinion, the panel should have looked more carefully at the explicit search condition itself and realized that it "did not plainly, clearly, and unambiguously provide notice that he was subject to searches without

even reasonable suspicion." *King*, 711 F.3d at 995 (Berzon, J., dissenting); *compare Samson*, 547 U.S. at 852 (condition "clearly expressed" to parolee and he was "unambiguously aware of it") (quotations omitted); *Knights*, 534 U.S. at 119 ("probation order clearly expressed the search condition and Knights was unambiguously informed of it"). But even if the search condition were clearer, this Court should still insist that the Fourth Amendment requires searches of a probationer's home be supported by reasonable suspicion of criminal activity.

This Court must determine the reasonableness of the search, taking a probationer's "consent" into account. *Scott*, 450 F.3d at 868. Assessing a "reasonable expectation of privacy" requires balancing an individual's privacy on one hand, and the need to promote legitimate government interests on the other. *Knights*, 534 U.S. at 118-19 (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)). The "reasonableness of an expectation of privacy, as well as the appropriate standard for a search, is understood to differ according to context." *O'Connor v. Ortega*, 480 U.S. 709, 715 (1987). When "a careful balancing of governmental and private interests" demonstrates that a Fourth Amendment standard less than probable cause is warranted, the Court has adopted the lesser standard. *Id.* at 722-23.

For example, when considering the interest in ensuring the "efficient and proper operation of the workplace," *O'Connor* held warrantless searches by public

employers for "noninvestigatory, work-related purposes" do not require probable cause, and are permissible if they are "reasonable." *Id.* at 725-26. Under *Terry v. Ohio*, 392 U.S. 1 (1968), the interests in "crime prevention and detection" as well as the need to allow officers to protect themselves and others in situations where officers do not have probable cause for an arrest allow the police to stop and frisk a person based solely on reasonable suspicion of criminal activity. 392 U.S. at 22, 30-31. The same is true of a vehicle stop. *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (quoting *United States v. Sokolow*, 490 U.S. 1, 7 (1989)) (quotations omitted).

Recently, this Court adopted a "reasonable suspicion" standard for forensic examinations of a computer at the international border. *United States v. Cotterman*, 709 F.3d 952, 968 (9th Cir. 2013) (*en banc*). The government has a heightened interest in controlling what comes in and out of the country at the border. *Id.* At 960 (quoting *United States v. Flores-Montano*, 541 U.S. 149, 152 (2004)). As a result, searches at the border are "reasonable simply by virtue of the fact that they occur at the border." *Cotterman*, 709 F.3d at 960 (quoting *United States v. Ramsey*, 431 U.S. 606, 616 (1977)). On the other side of the Fourth Amendment balance was the "substantial personal privacy interests" in the vast amount of information stored on electronic devices. *Cotterman*, 709 F.3d at 964. Finding the reasonable suspicion standard "modest" and "workable," the

court adopted it as a way to balance the government's strong security interest and corresponding reduction in a traveler's expectation of privacy at the border with the compelling privacy rights in the data on an electronic device. *Id.* at 966.

This Court should adopt the same standard for a search of a probationer's house. The privacy interests involved here are even stronger than in *Cotterman*. The "home is perhaps the most sacrosanct domain, where one's Fourth Amendment interests are at their zenith." *Fisher v. City of San Jose*, 558 F.3d 1069, 1082 (9th Cir. 2009) (en banc) (citing *LaLonde v. County of Riverside*, 204 F.3d 947, 954 (9th Cir. 2000)); *see also Silverman v. United States*, 365 U.S. 505, 511 (1961) (home is "the very core" of the Fourth Amendment). On the other hand, because the Supreme Court has claimed that probationers are "more likely than the ordinary citizen to violate the law," there is a government interest in supervising probationers to ensure they can be successfully reintegrated into society that justifies dispensing with the probable cause requirement. *Knights*, 534 U.S. at 120-21 (quoting *Griffin*, 483 U.S. at 880) (quotations omitted). But those same concerns about recidivism and reintegration are also true of parolees, which is why the Supreme Court in *Samson* approved of completely suspicionless searches. *Samson*, 547 U.S. at 853. And because probationers have a greater expectation of privacy than a parolee, this Court cannot treat them the same, as the panel did. *Id.* at 850.

Thus, although "searches and seizures inside a home without a warrant are presumptively unreasonable," a reasonable suspicion requirement to search a probationer's home allows this Court to fashion a rule that respects the strong privacy interests at issue here, while taking a probationer's reduced expectation of privacy and their potential consent to a suspicionless search into account. *Payton v. New York*, 445 U.S. 573, 586 (1980). This approach ensures that a probationer's expectation of privacy is treated appropriately on the criminal justice "continuum." *Griffin*, 483 U.S. at 874; *see also Fields*, 67 Haw. at 282.

On one end of that continuum is the non-convicted public, including individuals on pre-trial release who have yet to be convicted. Searches of those individuals must be supported by probable cause and a search warrant. *Scott*, 450 F.3d at 874. On the other end of that continuum are parolees, for whom a suspicionless search is permitted. *Samson*, 547 U.S. at 857. Probationers have a lesser expectation of privacy than the non-convicted public, but a greater expectation of privacy than a parolee. Thus, a search supported by the intermediate "reasonable suspicion" standard is appropriate when the interests are weighed.

CONCLUSION

The panel's decision treats probationers like parolees, overstates the significance of consent, and misunderstands the way probation is imposed on a

criminal defendant. Its decision to approve of the suspicionless search of a home, the place entitled to the most protection under the Fourth Amendment, eliminates this constitutional protection for all probationers. Therefore, this Court should grant rehearing *en banc*, and rule that reasonable suspicion of criminal activity is required before police can search a probationer's home without a search warrant.

Dated: May 2, 2013

Respectfully submitted,

s/ Hanni M. Fakhoury
Hanni M. Fakhoury

CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION,
TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS
PURSUANT TO FED. R. APP. P. 32(a)(7)(C)

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify as follows:

1. This Brief of *Amicus Curiae* In Support Of Defendant-Appellant complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,995 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2011, the word processing system used to prepare the brief, in 14 point font in Times New Roman font.

Dated: May 2, 2013

s/ *Hanni M. Fakhoury*
Hanni M. Fakhoury

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 2, 2013.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: May 2, 2013

s/ *Hanni M. Fakhoury*
Hanni M. Fakhoury